No. 87-659

In the Supreme Court of the United States

OCTOBER TERM, 1987

JOHN WILLIAM HAMMOND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

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Petitioner contends that an individual cannot be counted as being among the five persons who "conduct" an illegal gambling business under 18 U.S.C. 1955 unless that person was "necessary" to the operation of the business.

1. After a jury trial in the United States District Court for the District of Minnesota, petitioner was convicted on one count of conducting an illegal gambling business, in violation of 18 U.S.C. 1955, and on four counts of using interstate facilities to transmit wagering information, in violation of 18 U.S.C. 1084. He was sentenced to three years' imprisonment and a $30,000 fine. The court of appeals affirmed (Pet. App. A1-A17).

The evidence at trial showed that between August 1983 and January 1984, petitioner ran a baseball and football bookmaking operation in St. Paul, Minnesota. He used three other men—co-defendants James Rebeck, Steven Chiarella, and William Klabunder—to take bets over the telephone. The three men then relayed their information to petitioner. On occasion, petitioner's friend, unindicted

co-conspirator Sandra Crawford, also took messages from petitioner's customers. Pet. App. A2-A6.

Petitioner attempted to isolate himself from direct contact with bettors by using intermediaries. He placed Rebeck at a message center to take the names, and sometimes the telephone numbers, of bettors. The customer's names generally were in code. Rebeck would convey the coded names to petitioner, Chiarella, or Klabunder, who periodically would telephone Rebeck for that information. Petitioner would provide Chiarella and Klabunder with a directory of the codes and telephone numbers for the customers. Chiarella and Klabunder, like Rebeck, would record that information on rice paper, which was soluble in water. Chiarella and Klabunder, operating out of different locations, would then call the bettors and take their betting information, which they also would record on the rice paper. An unidentified man, who the evidence suggested was probably petitioner, would call Chiarella and Klabunder at 15-minute intervals and obtain the betting information from them. After Chiarella and Klabunder conveyed the messages to petitioner, they would destroy their tally sheets. Pet. App. A2-A4.

In the course of his bookmaking business, petitioner had Rebeck use Crawford's telephone as the message center for petitioner's customers. In August 1983 Crawford agreed to allow Rebeck to use her phone for that purpose. Although petitioner did not say that Rebeck would be taking bets, Crawford knew that her phone would be used in connection with the gambling business. Petitioner paid Crawford approximately $50 every two weeks or monthly for the use of her phone. He also gave Crawford a supply of rice paper, which Crawford gave to Rebeck. Crawford was present when many of the calls were received, and at times Crawford herself took messages from bettors and passed the messages on to other members of the business. At other times when Rebeck was

not at her house, Crawford directed potential bettors to call Rebeck at his residence. Pet. App. A5-A6.[1]

At trial and on appeal, petitioner did not dispute the evidence that he operated a bookmaking business. Instead, he argued that the evidence failed to satisfy the requirement in Section 1955 that five persons be involved in "conducting" the business, because Crawford merely assisted the business but was not necessary to its operation.[2] Both courts below rejected that claim.

The panel majority held that anyone who participates in a gambling business other than as a bettor or customer "conducts" the business within the meaning of Section 1955. The court noted but rejected the contrary ruling of the Tenth Circuit in *United States* v. *Boss*, 671 F.2d 396, 400-402 (1982), that an individual does not fall within the term "conduct" in Section 1955 unless that person performs a duty "necessary" to the operation of the illegal gambling business. The majority also noted that no other court of appeals had adopted the Tenth Circuit's definition of the term "conduct." Pet. App. A6-A8.

Judge Bright concurred in the result. In his view, "persons who do not directly participate in gambling operations should not be counted as persons 'involved' in the 'conduct' of such business within the purview of 18 U.S.C. § 1955(b)" (Pet. App. A12). Under Judge Bright's construction of the statute, persons such as cocktail waitresses or lessors of a location used for gambling should not be counted as persons who "conduct" a gambling business for purposes of Section 1955 (Pet. App. A12). Judge Bright

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[1] In addition, Chiarella and Klabunder paid three other persons to allow Chiarella and Klabunder to use their telephones to take bets (Tr. 161, 206-207, 245-251, 254-258, 267).

[2] Section 1955(b)(1)(ii) defines an illegal gambling business, in pertinent part, as one that "involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business."

concurred in the result, however, because he concluded that even under his construction of the statute, Crawford "conduct[ed]" the gambling business, because she at times directly participated in the gambling operation (*id.* at A13).

2. Petitioner renews his claim (Pet. 7-13) that the court of appeals improperly construed the term "conduct" in 18 U.S.C. 1955(b), and he contends that the decision of the court of appeals in this case conflicts with the decision of the Tenth Circuit in *United States* v. *Boss, supra.*

The Tenth Circuit in *Boss* confined the scope of the term "conduct" to persons who are "necessary" to the gambling business. As the court of appeals noted in this case, no other court has adopted the Tenth Circuit's interpretation of the statute. In the *Boss* case, the Tenth Circuit held that a cocktail waitress did not fall within the class of persons conducting a gambling business because she merely assisted the business rather than performing a function necessary to its operation. 671 F.2d at 402. All other courts facing the issue have held that anyone who participates in a gambling business, other than a bettor or customer, can be included as one of those who "conducts" the business. See, *e.g., United States* v. *Merrell,* 701 F.2d 53, 55 (6th Cir.), cert. denied, 463 U.S. 1230 (1983); *United States* v. *Colacurcio,* 659 F.2d 684, 688 (5th Cir. 1981), cert. denied, 455 U.S. 1002 (1982); *United States* v. *Greco,* 619 F.2d 635, 638 (7th Cir. 1980); *United States* v. *Bennett,* 563 F.2d 879, 881 (8th Cir.), cert. denied, 434 U.S. 924 (1977); *United States* v. *Calaway,* 524 F.2d 609, 617 (9th Cir. 1975), cert. denied, 424 U.S. 967 (1976); see also *Sanabria* v. *United States,* 437 U.S. 54, 70-71 n.26 (1978) (collecting cases). Whatever the proper resolution of that conflict, however, this case does not present it. As Judge Bright pointed out in his concurring opinion, Crawford's conduct brought her within even the Tenth Circuit's construction of Section 1955, because she actively

participated in the scheme at times. Pet. App. A12-A13. Besides allowing her telephone to be used to promote the gambling business and receiving compensation for that service, Crawford supplied Rebeck with rice paper, and on occasion she took bettors' names for the operation. See *id.* at A9. By performing those services, Crawford plainly was engaging in a function necessary to the scheme. Since it appears that even the Tenth Circuit would find Crawford to be one of the persons conducting the illegal business, this case is not an appropriate vehicle for resolving the asserted conflict among the circuits on this issue.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

NOVEMBER 1987

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[3] Petitioner also briefly asserts (Pet. 13) that he was denied due process because the statute failed to give him fair notice that his conduct was criminal. Because petitioner's conduct was within the reach of the statute under any court's standard, this argument is wholly without merit. Even if petitioner's conduct would not have violated Section 1955 under the Tenth Circuit's interpretation of the statute, petitioner still would not have a plausible due process claim; the court of appeals' construction of the statute was one that petitioner could easily have anticipated, particularly since the same court had long since interpreted the statute in precisely the same fashion as the panel majority in this case. See *United States* v. *Bennett*, 563 F.2d 879 (8th Cir.), cert. denied, 434 U.S. 924 (1977).

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